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No. 334

In the
Supreme Court of the United States
OCTOBER TERM, 1966

UNITED STATES OF AMERICA,
Petitioner,
v.
BILLY JOE WADE,
Respondent.

BRIEF FOR RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 44-49) is reported at 358 F. 2d 557.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 31, 1966 (R. 50). A petition for rehearing en banc was denied on May 11, 1966 (R. 51). On June 15, 1966, Mr. Justice Black extended the time within which to file a petition for a Writ of Certiorari to and including July 11,

1966 (R. 52). The petition for a Writ of Certiorari was filed on July 11, 1966, and Certiorari was granted on October 10, 1966 (R. 53). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that a lineup (at which Respondent and five or six other participants were asked to utter a specified sentence or sentences identical or very similar with that allegedly used by the robber) conducted after Indictment and without notification to Respondent's Counsel required exclusion of the courtroom identification of Respondent by the witnesses who had identified him at the lineup.

STATEMENT OF THE CASE

The following Statement of the Case by the Respondent with only slight variation is the Statement of the Case as stated by the Government in its Brief.

Respondent was convicted after a trial by jury, in the United States District Court for the Eastern District of Texas, under a two-count Indictment charging that he conspired to rob, and did rob, a federally insured bank in violation of 18 U.S.C. 371 and 2113(a) and (d) (R. 1-3). He was sentenced to imprisonment for five years on the conspiracy count and for fourteen years on the robbery count, the sentences to run concurrently (R. 42-43). The Court of Appeals reversed, one Judge dissenting (R. 44-50).

1. The evidence showed that a bank in Eustace, Texas, was robbed on September 21, 1964. While one man waited

outside in a parked automobile, another man, with strips of tape on each side of his face, entered the bank, aimed a pistol at Jean Chambers and Lee Gray, the bank's two employees, handed them a pillow case, and ordered them to fill it with currency. The employees complied. The robber then fled with his accomplice in a waiting car (R. 7-19, 27-31; Tr. 135-139, 188-189, 195).[1]

On March 23, 1965, an Indictment was returned charging Respondent and two others (named Pickett and Briggs) with conspiring to rob the Eustace bank, and charging Respondent and Briggs with executing the robbery (R. 1-3). Respondent was arrested on April 2, and on April 26 an Attorney was appointed to represent him (R. 5). On May 12, without notice to Respondent's appointed Counsel, Respondent was brought by the Federal Agent Kenneth Albert, whom both witnesses knew very well and being the same individual who had requested their presence in Tyler for the purpose of the lineup and identification. The Respondent was then observed alone or in company with F.B.I. Agent Kenneth Albert (Tr. 256). Shortly thereafter several other prisoners were brought down from the County Jail by local officers (Tr. 238). Some type of tape was placed upon the face of each of the members of the lineup. The Respondent and the other members of the lineup were not dressed alike. Respondent had been observed with Mr. Albert and the witness stated that the person whom he saw with the F.B.I. Agent "resembled" Respondent but could not say definitely that it was the same man.

[1] "Tr." refers to the typewritten transcript of the trial proceedings.

The prisoners, including the Respondent, were brought into the Courtroom and questioned and required to re-enact a portion of the crime (R. 44-49). Each was asked to repeat the phrase, "Put the money in this bag", or words of similar import. The two employees then identified the same man who had been observed in the custody of or in the presence of F.B.I. Agent Kenneth Albert (R. 24, 31 & 35).

2. At trial, after Respondent's two accomplices testified on behalf of the Government, Mrs. Chambers described the robbery in detail (R. 7-19) and identified Respondent as the man who had taken the money at gunpoint (R. 12). At the time of the robbery, she stated, he wore grey khaki pants, a long-sleeved sport shirt, and a straw hat. He had carried a nickel-plated gun and a pastel-striped pillow case, and had strips of tape affixed to his face (R. 11-12). On cross-examination, defense Counsel elicited the fact that after the robbery the witness had picked Respondent's picture out of a group of eight or nine photographs (R. 20). Defense Counsel also elicited, for the first time, the fact that Respondent had been identified by Mrs. Chambers at the lineup on May 12 (R. 22-25).

Gray also described the holdup of the bank (R. 27-31) and identified Respondent as the robber (R. 29). He stated that Respondent had worn grey khaki trousers, a long-sleeved sport shirt, and a broad-brimmed straw hat (R. 31), that he had carried a nickel-plated pistol (R. 28), and that he had a strip of tape on each cheek (R. 30). Just before the conclusion of the direct examination, Gray was questioned briefly concerning the lineup which had been revealed

in the cross-examination of Mrs. Chambers (R. 30-31). Gray's cross-examination related principally to the pre-lineup observation through the open door of Agent Albert and the man resembling Respondent (R. 32-35).

At the conclusion of the testimony, defense Counsel moved for a judgment of acquittal on the ground that Respondent's Fifth and Sixth Amendment rights were violated when the lineup was conducted without notice to Respondent's Attorney. Counsel also moved to strike the identification testimony of the two bank employees (R. 38-39). The motions were denied (R. 39).

3. The Court of Appeals, one Judge dissenting, reversed Respondent's conviction on the ground that the post-indictment lineup in the absence of Respondent's appointed Counsel violated Respondent's Sixth Amendment rights. The majority expressly adopted the view of the dissenting Judges in *United States* ex rel. *Stovall v. Denno*, 355 F. 2d 731 (2nd Cir. 1966), Certiorari granted, 384 U.S. 1000. The dissenters in *Stovall* believed that an indicted Defendant is entitled to the assistance of Counsel when the Government "wishes to make use of him to obtain evidence that will have independent testimonial value" (R. 47), whether or not the desired evidence is of the kind protected by the Fifth Amendment. The majority in this case said that, had Counsel been present, he could have instructed Respondent not to make the responses requested for purposes of voice identification, and that he could have prevented the situation whereby the bank employees saw Respondent before the lineup took place (R. 47-48). In the circumstances, the

majority found that the "illegal procedure" might well have prejudicially colored the bank employees' courtroom identification (R. 48-49). The majority concluded that reversal was required, and that in the event of a new trial "the evidence of the two bank witnesses, following the occurrence that we have held to have violated Wade's rights, must be omitted" (R. 49).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, together with *Gilbert v. California*, No. 223, this Term, and *Stovall v. Denno*, No. 254, this Term, present the question whether the clause of the Sixth Amendment which guarantees to an accused in a criminal prosecution "the assistance of Counsel for his defense" requires that a Defendant's Attorney be given notice and an opportunity to be present at a witness' pretrial identification of the Defendant.

Our basic position is contrary to that of the Government in that it is the firm opinion and position of the writer that at anytime after the investigative process has become accusatory and focalized upon the Defendant that the Defendant has without a doubt, guaranteed by the Constitution of the United States of America, the right to have Counsel, either retained or appointed, present with him to protect those rights. We cannot agree with the Government's position that a lineup where a Defendant is required to utter specified words or sentences identical with or similar to that allegedly made by the malefactor is not a stage of the proceedings and does not require the presence of Defendant's

Attorney. Such a lineup cannot be anything other than a part of the net of evidence which the Government or the investigating officers are attempting to weave around that individual who is no longer a suspect but one charged and Indicted for the crime.

The Government states "whether it (lineup) occurs before or after Indictment, identification is not a stage of the adversary process by which guilt or innocence is determined". This statement appears to this writer to be totally inadequate in that what investigator would hesitate to admit that if the eye witnesses to the crime had failed to identify the accused that in all probability no further action against the accused would have been held. The writer respectfully urges that an accused is entitled at all times, especially after the appointment of his Counsel, to have Counsel present with him at any investigatory proceeding where portions of the crime being investigated are to be re-enacted. It is also deemed relevant by the writer that even Congress has recognized the importance of Counsel being present. The Criminal Justice Act of 1964 states in sub-paragraph (c): "A Defendant for whom Counsel is appointed shall be required at every stage of the proceedings from his initial appearance before the United States Commissioner or Court through appeal. * * *" 18 U.S.C. 3006A. The same requirement has been incorporated in Rule 44(a) of the Federal Rules of Criminal Procedure.

The Government's position that Counsel has no Attorney's function to perform at a pretrial identification to the writer appears to be faulty. The Government states "the law enforce-

ment officials who have the accused in custody would not be obliged to heed his suggestions regarding lineup procedures". This statement in all probability is correct. Nevertheless presence of Counsel for the Defendant would insure that Defendant had the benefit of Counsel to assist him in his activities to prevent him through ignorance or otherwise from waiving any Constitutional guarantees which he might possess at such lineup and with which Counsel is obligated to protect.

The Government further states that "no Constitutional rights are jeopardized by a pretrial identification (as contrasted with an interrogation)." The writer fails to see how the Government can justify such a statement when it is admitted by the Government that in the instant case questions were asked and answers were solicited including parts of the crime and re-enactment of the same in the presence of witnesses who, by their own testimony, stated that they or each of them had never seen the person who robbed the bank before such robbery, were not acquainted with the robber and were brought to Tyler for the purpose of identifying the person charged by the Government as being the robber; such lineup occurred approximately six months after the commission of the crime.

It is the position of the writer that the lineup in this case violated the Fifth Amendment privilege against self-incrimination. Respondent was asked to provide evidence "of a testimonial or communicative nature". In this writer's opinion such was contrary to *Schmerber v. California*, 384 U.S. 757 (1966) and contrary to the position taken by the

Government on this point. Observation of appearance and physical characteristics possibly infringed no Constitutional privilege. However, in asking the Respondent to speak a prescribed sentence (a re-enactment of a part of the crime), the Government was compelling a testimonial disclosure. If in fact all that the Government had desired to obtain from the subject was a display of the sound of his voice, quite possibly they could have requested the Respondent to read portions of the Constitution, some novel, or a local newspaper but such was not the case. The Government obtained from the Respondent a re-enactment of a portion of the crime, placing him in a lineup with other individuals, placing tape upon his face and requiring statements identical or similar to the statements made by the robber. However, the Government was not nearly so careful in seeing that the Respondent was not observed by the witnesses alone prior to the lineup or seeing that the Respondent and others in the lineup were dressed similar to the robber nor seeing that all the members of the lineup wore broad-brimmed western hats (R. 31). On the contrary, as the writer understands the testimony Respondent was seen alone with the F.B.I. Agent Albert; pictures of the Respondent had been shown to the witness, presumably by Mr. Albert, who, from the testimony was handling the investigation and preparation of the case for the Government at the essential times in question; Mr. Albert was the initiating party at the lineup and it was he who asked the questions and received the responses and as a result obtained the improper identification of the Respondent.

The writer is in complete agreement with the majority opinion of the Fifth Circuit written by Judge Tuttle which requires the exclusion of the improperly obtained identification and urges this Court to adopt the rationale of the Fifth Circuit in this cause. Unless this Court adopts such opinion, then there is no consequence to any improper activity of this nature by the officers of the Government for the reason that if this Court allows the identification testimony of the witnesses as being legitimate, then the Defendant would be stripped of the benefits of the rights guaranteed him in this matter. Therefore, it is urged that the majority opinion of the Fifth Circuit in this cause be adopted by this Court and that the cause be remanded for another trial not inconsistent with the opinion rendered by the Fifth Circuit.

ARGUMENT

I.

PRETRIAL IDENTIFICATION OF AN ACCUSED IS A STAGE OF THE CRIMINAL PROCEEDINGS WITHIN THE ASSISTANCE-OF-COUNSEL GUARANTEE OF THE SIXTH AMENDMENT

This Court's decisions have clearly shown that an individual accused of felony charges is Constitutionally entitled to the assistance of Counsel at every "critical stage in a criminal proceeding". *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963); *Massiah v. United States*, 377 U.S. 201 (1964). Accordingly the Court below deemed this Constitutional rule applicable in the instant case and from the facts presented properly determined that the Government's agents "deprived him of the aid of Counsel at a

critical stage of the prosecution" (R. 47)—i.e. the activities surrounding the lineup where the accused, already under Indictment, was required to participate in a lineup and re-enact a portion of the crime being investigated in the presence of witnesses after having been observed alone with the Federal Agent. The Government contends in its Brief (p. 11) "Pretrial identification is not, in any theoretical or practical sense, a part of the formal adversary proceeding in which Respondent's guilt or innocence is determined". The writer frankly admits that at such pretrial identification mentioned by the Government there was no Judge present, there was no jury present, there was no Court Reporter present. Such activity was not held in open Court (however the lineup was held in the Courtroom in the Courthouse so as to in a sense imply authenticity, truth and correctness). The accused, of course, was there in custody and pointedly questioned, according to the record and opinion of the Court below, and required to re-enact a part of the crime. As a result, witnesses Gray and Chambers identified the accused. The writer respectfully submits that such activity was and is a vital part of the prosecution and an integral part of the adversary process and that Counsel for the accused should have been present, especially in the instant case for the reason that Counsel had already been appointed, had had contact with the accused and the Government's employees had been so advised by copies of the letter of appointment having been filed with the United States Clerk, the United States Attorney and the United States Marshal's Office. Thus Counsel's presence would not only be appropriate but should be required. The illustrations given by the Government, such as

ballistics examination, fingerprint examination, footprint examination do not apply in this instance for among other reasons the footprints examined by the use of casts, photographs, etc. could likewise be adequately examined by representatives of the accused at a later time. Fingerprints could be examined at a later time and compared. Handwriting could be examined at a later time. However, in this instance the only matter which can be examined at a later time by Counsel for the accused or the accused's witnesses is the memory of the Government's witnesses and the Government's agents as to what actually transpired at such lineup. This Court is well aware of the faultiness of human memory and the unconscious attempt by a normal human being to justify and sustain any of his actions which might be questioned. No reflection upon the integrity of the Government's agents or its witnesses is intended, but Counsel for the accused respectfully submits that the Government's agent in all probability informed the witnesses that he had the "man" and that he wanted them, the witnesses, to identify the accused. That the witnesses were brought to the Smith County Courthouse, where from a partial reconstruction of the occurrences, we find the accused with the Government agent alone. Then at a later time other prisoners are available with the accused. The accused is then required to reenact a part of the crime and then follows the identification.

The writer respectfully submits that such activity of the Government cannot be re-examined by defense Counsel at leisure without error or under the same circumstances as

could a set of fingerprints, a set of footprints, a blood test, or handwriting specimen and that the activity of the Government's agents and its witnesses and the product—identification—should not be allowed for the reason that such was obtained in violation of the Constitutional rights of the accused.

The Government also states in its Brief (p. 13) "Pretrial identification through a lineup or by a confrontation between an accused and a victim or witness (in which the accused is not interrogated or otherwise requested to make testimonial disclosures) is, in essence, part of the prosecution's interview of the witness". This statement may, for the purpose of argument, be correct. However, it has no application in this case for, as is shown by the testimony of the witnesses Gray and Chambers and in the opinion of the Court below, the accused was required to re-enact or utter a part of the crime without the "guiding hand of Counsel". See *Powell v. Alabama*, 287 U.S. 45 (1932). Thus the obvious violation of Respondent's Constitutional rights dictates the inadmissibility of the tainted identification at the trial.

The Government makes a very illuminating statement in its' Brief: "Observation of the accused when he is unaccompanied in a less reliable indicator of the witness accuracy or probity". (p. 14) Such statement is a part of the accused's contentions in this instance because of the pre-lineup observation by the witnesses of the accused in the company of the Federal Agent whom the witnesses knew. This pre-lineup observation followed immediately thereafter by the lineup in which the individual seen in the isolated presence of the

known Government officer is required to re-enact a part of the crime would necessarily influence the opinion of the witnesses in identifying the accused. The admitted unreliability of such observation confirms the contention of the accused that his Constitutional rights were violated.

II.

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS VIOLATED WHEN THE ACCUSED IS REQUIRED TO RE-ENACT A PART OF THE CRIME WHEN HE IS SUBJECTED TO PRETRIAL IDENTIFICATION WHILE IN CUSTODY (BEING REQUIRED TO UTTER STATEMENTS IDENTICAL OR SIMILAR TO THAT ATTRIBUTED TO THE MALEFACTOR)

It is the opinion of the writer that the Government is in error in its contention that the Fifth Amendment privilege against self-incrimination is not violated in the circumstances attendant at this cause.

In the instant case the accused was required, according to the record, to utter a prescribed sentence identical or very similar to that attributed to the robber. Thus, in the opinion of the writer, we cannot escape the conclusion that the accused was being required to testify against himself.

The writer would request the Court to visualize the lineup in question and the writer feels that the Court can very easily see that the accused had already been Indicted; already had Counsel appointed; had already been photographed in all probability; that the witnesses were brought from a distance for the specific purpose of identifying the man whom the Government had Indicted for the offense upon the statements of two admitted liars, being Briggs and Pickett; that

the accused was in the custody of the F.B.I. Agent Albert, and in spite of the Affidavit made by the F.B.I. Agent, was observed alone with the F.B.I. Agent in the absence of other prisoners; that the lineup was then held and the inquisitor at the lineup was none other than the F.B.I. Agent Albert, who had summoned the witnesses to the lineup; had told them the express purpose of the lineup; and the inquisitor proceeded to ask the questions; received the answers; and in all probability being of the opinion himself that the accused was guilty, either consciously or unconsciously, focalized his attention upon the accused.

Under the above circumstances, who is able to reasonably say that the identification of the witness was not prompted by the testimonial disclosures made by the accused when being interrogated by the F.B.I. Agent in the absence of Counsel.

Thus, it is the opinion of the writer that the majority opinion of the Circuit Court should be adopted in this cause.

III.

THE TESTIMONY OF WITNESSES WHO IDENTIFIED RESPONDENT IN OPEN COURT WAS NOT ADMISSIBLE BECAUSE RESPONDENT'S CONSTITUTIONAL RIGHTS WERE VIOLATED DURING THE LINEUP.

The government's contention that the testimony and identification of the witnesses should be available regardless of unconstitutional activity by the officers to this writer is unsound.

It is the opinion of the writer that if this Court adopts the contention of the Government the protections of the

Constitution available to an accused would become worthless because the Constitutional rights of an individual such as Respondent, to the assistance of Counsel and to not be a witness against himself could be violated with impunity, consciously or unconsciously, by the Government and there would be no consequence to such violations.

The writer respectfully urges this Court by its opinion to inform officers, be they local, State or Federal, that the fruits of unconstitutional activity will not be tolerated nor allowed to benefit those responsible for such violations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WELDON HOLCOMB,
Attorney for Respondent by Appointment.

January, 1967